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In the Supreme Court of the United States

October Term, 1991

Mary Schuldt and Douglas Schuldt on behalf of themselves and their minor daughter, ERIKA SCHULDT, Petitioners

v.

Mankato Independent School District No. 77, Respondent

Reply to Brief in Opposition to a Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

REPLY BRIEF OF PETITIONERS TO RESPONDENT'S BRIEF IN OPPOSITION

Sonja D. Kerr,
(Counsel of Record)
3421 Kent Street
Shoreview, Minnesota 55126
(612) 483-6209
Counsel for Petitioners

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INTRODUCTION

Respondents' arguments in opposition serve only to highlight the confusion and conflicting standards that exist among the courts with respect to what remedies are appropriate for violations of the EHA. Understandably, courts have been reluctant to intrude on school district prerogatives and the various levels of reluctance have manifested themselves in different standards. It is clear, however, that Congress did not intend the level of deference given here. The Eighth Circuit has declared that: First, procedural violations of necessity require remand to an administrative tribunal; Second, that violations of the IEP process which Congress unequivocally indicated to be the core of the EHA, are subject to a "harmless error" standard; and Third, that the district courts may apply a cost-benefit analysis in order to uphold the school district's decision. None of these holdings is consistent with the statutory language, its Congressionally

stated intent or the rulings of this Court or other circuit courts of appeals.

Moreover, the level of deference afforded by the Court's ruling made the difference in this case. The Administrative Hearing Officer who heard the testimony of the school district officials and experts concluded that Erika should be placed at her neighborhood school. Accordingly, this case is an excellent vehicle for this Court to resolve the conflicting standards applied in cases involving this critical aspect of the EHA. The remedy afforded to a handicapped child and her family for procedural violations of the EHA, a federal Act, should not turn on the jurisdiction in which the child happens to live.

ARGUMENT

I. The Courts Below Required Erika to "Re-Exhaust" Administrative Proceedings Creating a Conflict with Other Circuit Courts and Contrary to the EHA and *Board of Education v. Rowley.*

Respondent cast Petitioners' argument as a challenge to the district court authority to remand. That is wrong. As Petitioners state, the issue is whether there must be a remand to administrative proceedings for procedural violations of the EHA. Respondent's argument on the remand issue is a red herring. They suggest that Erika "waived" her right to a determination of procedural compliance by the District Court. The exchange set forth in Respondent's Brief is, however, misleading.[1]

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[1] The Court had asked for the "practical effect" of returning the problem to the IEP process to send it "back for them to start anew." (Resp. Brief, App. A-v, vi) Erika's counsel explained that Erika wanted a determination; the matter had dragged on long enough without resolution. Notably absent from Respondent's Appendix is the school district's counsel statement that it was the "belief of the district that only adminis-

(continued...)

The District Court had a responsibility to determine if procedural violations had occurred and to grant relief. *Board of Education v. Rowley*, 458 U.S. 176 (1982); 20 U.S.C. § 1415(e)(2) Instead, the District Court refused to reach the issue, claiming Erika had "waived" her rights. Erika's position is consistent and exactly what this Court envisioned in *Rowley*:

> Judicial review invariably takes more than nine months to complete, not to mention the time consumed during the preceding state administrative hearings. The District Court thus correctly ruled that it retained jurisdiction to grant relief because the alleged deficiencies in the IEP were capable of repetition as to the parties before it yet evading review.

Id. at 188 (Ftnote 9)

The decisions of the Third and Fourth Circuits reinforce this approach. The Respondent tries, without success, to distin-

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[1](...continued)
tration, and not the mandated IEP team could make Erika's placement decision." Dist. Ct. Transcript, at p. 17 So, any return to the IEP process, under the circumstances, would have been futile.

guish *Muth v. Central Bucks School District*, 839 F.2d 1136 (3rd Cir. 1988); *Muth v. Smith*, 646 F. Supp. 280 (E.D.Pa. 1986) and *DeVries v. Spillane*, 853 F.2d 364 (4th Cir. 1988). In *Muth*, the Court reviewed the authority of the district courts to grant relief under 20 U.S.C. § 1415(e)(2). The *Muth* Court recognized the ability and responsibility of courts to do so, when equity demanded it. *Muth v. Central*, *Id.* at 126. Respondent also misunderstands *DeVries*, and argues that because *DeVries* involved more than one IEP, the case is distinguishable from the instant situation. The critical piece of the *DeVries'* decision is that the Court required the need for district courts to make these decisions without requiring parents to return time and again to an administrative process. Here the lower court refused to even reach the issue of procedural compliance unless Erika agreed to start the IEP process anew.

The Eighth Circuit clearly conflicts with these decisions, the Act itself and *Rowley*. It has fashioned a rule that if a disabled child complains of procedural violations, district courts need look no further unless the child agrees to return to those same and sometimes futile proceedings.

The Eighth Circuit stated:

> "Furthermore, the failure of the school district to comply with procedural requirements, of necessity, would require remand for further consideration."

Pet. App. 1-9

The conflict among the Circuits is created by the Eighth Circuit's opinion and is unsupported by the EHA and so requires this Court's review.

II. The Eighth Circuit's Adoption of a Harmless Error Standard and Refusal to Provide Erika a Remedy for Violations of the EHA creates Conflict Among the Circuits and is Contrary to the Act and Decisions of this Court.

A. The Circuit Courts are Divided on the Appropriate Standard to Apply When Procedural Noncompliance is Found.

Respondent takes the surprising position that no conflict exists as to the second question presented because all the circuit courts have adopted a "harmless error" standard. Even if this were true, and it is not, such a standard is contrary to the EHA, clearly expressed Congressional intent and decisions of this Court, and therefore, warrants review.

The Respondent suggests that the Eighth Circuit decision is consistent with the Fifth Circuit. In *Jackson v. Franklin County School Board*, 806 F.2d 625 (5th Cir. 1986), however, the Court held that a school district's failure to convene a conference, and failure to provide written notice

constituted a denial of a free appropriate public education. The *Jackson* Court explained:

> "We agree with the Fourth Circuit in finding that failures to meet the Act's procedural requirements are "adequate grounds by themselves" for holding that the school failed to provide a free appropriate public education, as mandated by the Act."

Id. at 629

The fact that the *Jackson* Court sent the matter back to the district court to determine whether nominal or substantial damages should be awarded does not diminish its finding that the violations resulted in a denial of a free appropriate education.[2]

The Respondent tries to construe the Fourth Circuit cases as consistent with the decision of the Eighth Circuit

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[2] As the Court is no doubt aware, this issue, insofar as placement, may not be settled in the Fifth Circuit, given the recent decision in *Weil v. The Board of Elementary and Secondary Education and the Ousachita Parish School Board*, 931 F.2d. 1069 (5th Cir. 1991), on which the Court recently granted certiorari.

here. But the Fourth Circuit cases are clear. They provide that if the school district engages in the same violations[3] that the Mankato School District did here, there has been a denial of a free appropriate public education. Such violations are not, in the Fourth Circuit, "harmless error." In *Hall by Hall v. Vance Cty. Bd. of Educ.*, 774 F.2d 629 (4th Cir. 1985), the school board excluded parents from the team process, failed to advise them of their rights, and did not provide required notices. The Mankato School District committed the same violations by having a single administrator, rather than an IEP team, including the parents, make Erika's placement decision. Yet the Eighth Circuit, unlike the Fourth, found no denial of a free appropriate public education. In *Spielberg v. Henrico*

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[3] The Respondent tries to minimize the violations it committed. The Court is reminded that the Minnesota Commissioner of Education found that "the District unilaterally changed Erika's placement and redesigned a program for her outside the team process required by state and federal law." (Pet. App. at E-40 and F-110)

Public Schools, 853 F.2d 256 (4th Cir. 1988), the Court held that determining a child's placement before developing an IEP was sufficient to deny a free appropriate public education. Here, the Minnesota Commissioner of Education found the Mankato school district had committed this same contravention of the IEP process -- exclusion of the parents from the process. Yet the Eighth Circuit, unlike the Fourth Circuit, affirmed the illegally created placement. Had the violations committed here against Erika been committed by a school district in the Fourth Circuit, there would have been a finding that the child had been denied a free appropriate education, while in the Eighth Circuit they are simply "harmless error."[4]

Nor has the Sixth Circuit adopted the same approach as the Eighth Circuit. In *Thomas v. Cincinnati Board of*

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[4] The Respondent also cites *Tice v. Botecourt County School Board*, 908 F.2d 1200 (4th Cir. 1990) and *Hudson v. Wilson*, 828 F.2d 1059 (4th Cir. 1987). In *Tice*, the Court acknowledged procedural violations but the child essentially did not object to them. In *Hudson*, the Court found procedural compliance.

Education, 918 F.2d 618, at 619 (6th Cir. 1990), that Court re-emphasized its commitment to parental participation:

> "The . . . Act . . . was passed in 1975. . . . Congress concluded that the problem was the result not only of financial constraints at state and local levels but was also due to state and local laws which enabled school districts to exclude children without consultation with their parents."

So, the Sixth Circuit's critical test is first whether or not written notice of an action was provided, and next, can the school district show compliance by proving that the parents did participate in the process? Obviously, the Mankato School District would fail this test because the Schuldts were not included prior to the decision to exclude Erika from Roosevelt. That decision was an edict issued by a single administrator, upon the advice of the school district's attorney. Not until after the decision was made and the Schuldts objected to Erika's exclusion by insisting on their rights were the Schuldts included in negotiations about the already

decided placement. Moreover, the district administration continues to insist that this decision was one for the administration, not the IEP team, including Erika's parents, to discuss and decide.

The Eighth Circuit's decision is also in conflict with the D.C. Circuit. That circuit has ruled that where notice was given, but without the content required by the EHA, the parents did not receive appropriate or sufficient notice. *McKenzie v. Smith*, 248 App. D.C. 287, 1527 (1985) The Eighth Circuit completely ignored Erika's complaint that the brief letter issued by the district administrator failed to meet the notice requirements of the EHA. 34 C.F.R. § 300.504, § 300.505

The impact of these procedural requirements was explained in Petitioners' opening brief, and will not be repeated here. However, as the district court in *Lang v.*

Braintree School Committee, 545 F. Supp. 1221 (U.S. Dist. Ct. MA, 1982) notes:

> ". . . the school [does not] comply with the procedural requirements of the Act by including the parents only in the initial and the penultimate steps of the planning process. Unless they are invited to participate in all significant decisions made by the school, the statutory deference to state and local decision-making in the educational field would not be justified." *Id.* at 1223, Ft. #3 (emphasis added)

The Mankato School District did not include the parents in the significant decision about placement; it kept that decision for its administrator.

For all of these reasons, the Court should grant the Petition for Certiorari and rule on these critical issues. Otherwise, school districts across the country will be empowered to manipulate the IEP process and declare after-the-fact that decisions made outside that process and in violation of its are entitled to deference and need not be remedied because they are "harmless."

B. The Eighth Circuit's Decision is Contrary to the EHA and *Board of Education v. Rowley.*

Respondent makes a poor attempt to argue that *Board of Education v. Rowley*, 458 U.S. 175 (1982) itself permits a harmless error standard. It cites *Rowley's* recognition that "adequate compliance" with the Act's procedures is all Congress required. But "adequate compliance" means compliance nonetheless. The issue here is what remedies are appropriate when violations are found.[5]

Moreover, the *Rowley* Court assumed that a school district would comply with the procedures "giving parents and guardians a large measure of participation at every stage of

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[5] In *Rowley*, unlike this case, there were no findings that the school district failed to comply with the Act's procedures. The parents, unlike the Schuldts, were not excluded from the decision-making process. The school administrators and IEP team met with the Rowleys before the decision was made to deny an interpreter; they even provided an interpreter for a trial period. In contrast, the Mankato District administrator made the decision outside this process; so the school district would not have "adequately complied."

the administrative process." *Id.* at 178. This, the Mankato School District did not do. The Eighth Circuit's affirmation of the school district's activities is contrary to the *Rowley* decision. The Respondent's very suggestion that the acts of the school district here are consistent with the *Rowley* Court speaks to the critical need for the Court to review this case.

III. The Courts Below Adopted a Cost-Benefit Analysis That Conflicts with Decisions of Other Circuit Courts and Administrative Agencies.

Respondent claims that the District Court did not adopt a cost-benefit analysis. Yet, the record is clear that the District Court and the Eighth Circuit considered cost as one reason, indeed the central reason, why Erika could not attend Roosevelt.

The District Court stated:

> "Relevant considerations also include both the cost to the school district and the benefit to the child. *A.W.*, 813 F.2d at 163-64; *Roncker ex rel. Roncker v. Walter*, 700 F.2d 1058,

> 1063 (6th Cir.) cert. denied, 464 U.S. 864 (1983). This test is consistent with the Act which qualifies the mainstreaming requirement by stating that it should be implemented to the 'maximum extent appropriate,' 20 U.S.C. § 1412(5), and *Rowley's* acknowledgement that financial resources must be equitably distributed among all handicapped children. *Rowley*, 458 U.S. 176, 193 n. 15; see also *A.W.*, 813 F.2d at 163-64 (collecting cases). (Pet. App. D-20, 21) (emphasis added)

While it is true that the Eighth Circuit claimed this consideration was not the only factor, it does not have to be the only test to be an erroneous test as applied to the issue of accessibility. Moreover, the Eighth Circuit goes on past the passage cited by Respondents (brief at pg. 34) to add:

> "While it is true that the school district did not introduce extensive evidence of the impact the costs of structural modifications would have on the overall budget, the Schuldts themselves introduced substantial testimony on that issue. Moreover, the district court did not need such specific evidence to know that the total funds available to the school district are limited, and it is axiomatic that funds spent modifying Roosevelt must, of necessity, mean a reduction

of funds available for other education related needs. (Pet. App. A-16)[6]

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[6] The only evidence submitted in this case occurred at the due process hearing. The court may judge for itself whether the school district claimed cost was a factor at that time or submitted evidence of its inability to pay the costs of modifications by reviewing the hearing officer's findings of fact at F-72, F-35, F22. The Respondent claims and the lower courts suggested that the Petitioners have misread the testimony of Mr. McFarling concerning cost. This is unfair and misleading. The hearing officer herself posed additional questions about costs to Mr. McFarling. She concluded, in comparing this case with *Pinkerton v. Moye*, 509 F. Supp. 107 (W.D. Va., 1981), that:

> "In that case, however, cost was a major factor. The *Pinkerton* Court held that the School District made a reasonable accommodation because of the cost considerations involved, the small number of students within the school district in need of self-contained classrooms, and the short additional commuting distance. In the present case, the School District's main witness testified that cost was not a factor, that the School District had the resources to make the structural modifications and that if the School District had concluded that the Roosevelt school building could have been made accessible it would have expended the funds to do so." (Pet. App. at F-110)

(continued...)

Yet, the only judge to actually hear the testimony concluded that cost was not a factor to the district and the district could afford to make the school accessible.

Even, if, as the Respondent argues, it was appropriate for the school district and the lower courts to consider cost as a factor in making a placement decision, the decision by the school district was made without knowledge of the financial facts. The school district excluded Erika from Roosevelt on June 16, 1988. The district's architect issued his report on August 29, 1988. (Pet. App. F-27, F-31, F-102)

The critical point is that Respondent suggests some courts have adopted this cost-benefit analysis while Petitioners assert that some courts and administrative agencies have questioned its use in accessibility cases. This being the

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[6](...continued)
Thus, if Petitioners state that the school District claimed cost was not a factor, they are not alone in that interpretation; the only judge to hear live testimony on the matter agreed.

situation, then a conflict certainly exists that is worthy of this Court's review.

Finally, the *Barnett v. Fairfax County School Board*, 927 F.2d 146 (4th Cir. 1991) is unlike this situation. There, the court found that the child's program could not be duplicated at the home school because of the scarcity and cost of specialized service providers. In contrast, Erika's program can be provided at Roosevelt. She does not have a special educational program and her therapy needs can be met there. *Barnett* focused on the cost of duplicating services. All of Respondent's argument on this issue is a *post hoc* argument - the kind that would receive strict scrutiny under the appropriate standard.[7]

Based upon the findings of the Federal Office of Special Education, the Act itself, and the interpretations of this court, and other courts and agencies, the Court should

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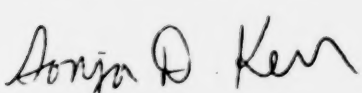
[7] See Hearing Officer's findings of fact. (Pet. App. at F-106)

grant the Petition and explain the standard to use when school accessibility is the issue.

CONCLUSION

For these reasons, and the reasons stated in the Petition, this Court should grant the Petition and review the case.

Respectfully submitted,



Sonja D. Kerr
(Counsel for Petitioners)
3421 Kent Street
Shoreview, Minnesota 55126
(612) 483-6209